

1 Frederick Melms Esq.
SBN 1093957
2 Melms2010@gmail.com
3 6329 Spindrift Foam Ave
Las Vegas, Nevada 89139
4 Telephone: (715) 892-3023

5 *Attorney for Plaintiff*
6 *Shannon Jensen*

7
8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN**

10 BR b/n/f SHANNON JENSEN; SHANNON
JENSEN individually and on behalf of
11 themselves and those similarly situated,

12 Plaintiff,

13 vs.

14 WAUKESHA BOARD OF EDUCATION;
15 SCHOOL DISTRICT OF WAUKESHA;
JOSEPH COMO JR.; JAMES SEBERT; BILL
16 BAUMGART; GREG DEETS; PATRICK
17 MCCAFFERY; COREY MONTIHO; KELLY
PIACSEK; KARIN RAJNICEK; AMANDA
18 RODDY; ANTHONY ZENOBIA; and Does 1-
10 on behalf of themselves and those similarly
19 situated,

20 Defendants.

Case No. 2:21-cv-01151-SCD

**Ex Parte Motion for Provisional Class
Certification and Temporary Restraining
Order and Declaration of Frederick Melms.**

21 **Ex Parte Motion for Provisional Class Certification and Temporary Restraining**
22 **Order.**

23
24 BR b/n/f SHANNON JENSEN, SHANNON JENSEN individually and on behalf of
25 themselves and those similarly situated, by and through her attorney of record FREDERICK
26 MELMS ESQ, moves for an Ex Parte order certifying a Plaintiff Class and a Defendant Class for
27 the purposes of a Temporary Restraining Order and a Temporary Restraining Order ordering that
28 all K-12 public schools without mandatory masking implement a mandatory masking policy. This

1 motion is made based on the Declaration of Shannon Jensen, the Complaint for Declaratory and
2 Injunctive Relief, the attached Exhibits including the report of Doctor Ramzy Rimawi M.D., and
3 the Memorandum of Points and Authorities.

4
5 **I. INTRODUCTION**

6 The instant case stems from the May 12, 2021, decision by the Waukesha Board of
7 Education (Hereinafter “BOARD”) to remove many of the Covid-19 mitigation measures from
8 School District of Waukesha (Hereinafter “WSD”) Schools. Most importantly, the WSD removed
9 the requirement that students, staff, faculty and visitors wear face masks while in their schools.
10 This decision was reckless and made without the considering the safety of students or the
11 community, and in direct defiance of the recommendations from the Centers for Disease Control
12 and the Wisconsin Department of Public Instruction. See Exhibit 1 (Report of Doctor Ramzy
13 Rimawi M.D.).

14 The WSD was not alone in their decision to remove covid mitigation strategies from their
15 schools for the 2021-2022 school however, many school districts around the state of Wisconsin
16 decided to make similar decisions. The failure of school districts to fulfill their duties under the
17 Fourteenth Amendment to the Constitution of United States and laws of Wisconsin is currently
18 and will continue to irreparably injure students and the community by causing illness and death.

19 Plaintiff respectfully requests a temporary restraining order (“TRO”) to avoid further harm. In
20 the instant case, Plaintiff is likely to succeed on the merits because Defendants’ failure to
21 implement covid-19 mitigation measures violates the Constitution and constitutes a public
22 nuisance. Should emergency relief not be granted, Plaintiff and students throughout the state of
23 Wisconsin face irreparable harm in the form of illness and death caused by the Covid-19 virus. By
24 contrast, neither Defendants nor the public would be harmed by a TRO forcing the implementation
25 of the universal masking policy recommended by both the Centers for Disease Control and
26 Wisconsin Department of Public Instruction.

1 **II. FACTUAL HISTORY OF THE CASE**

2 COVID-19 also known as COVID and the coronavirus, is a contagious disease caused by
3 severe acute respiratory syndrome coronavirus 2 or (SARS-CoV-2). The virus has an incubation
4 period between two and fourteen days and is highly contagious and deadly see Exhibit 1 (Doctor
5 Ramzy Rimawi M.D.). Covid-19 can cause a myriad of symptoms ranging from a fever or chills, a
6 cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, a headache, a loss
7 of taste or smell, a sore throat, congestion or runny nose, nausea or vomiting, diarrhea, organ
8 failure, and respiratory failure. See Exhibit 2, (Covid-19 Symptoms).

9 The Covid-19 pandemic drastically changed the K-12 schooling during the Spring of 2020.
10 All Wisconsin schools were shut down by order of Governor Evers and most students were taught
11 virtually. See Exhibit 3, (Emergency Orders).

12 On August 10, 2021, the Wisconsin Department of Public Instruction (hereinafter “DPI”)
13 released a publication entitled COVID-19 Infection Control and Mitigation Measures for
14 Wisconsin Schools 2021/2022. See Exhibit 4. In the COVID-19 Infection Control and Mitigation
15 Measures for Wisconsin Schools 2021/2022, the Wisconsin Department of Public Instruction
16 makes several recommendations for steps Wisconsin schools should take to limit the spread of
17 Covid-19. Specifically, the DPI recommends that schools encourage children and staff who have
18 been exposed to COVID-19 to stay home and get tested, encourage good hand hygiene, promote
19 vaccination to eligible students and staff, maintain a policy of physical distancing between
20 students and staff, limit non-essential visitation to the schools, establish contact tracing programs,
21 improve ventilation where possible and disinfect surfaces within the school on a daily basis.
22 Finally, the DPI recommends that all Wisconsin schools institute mandatory masking policies for
23 students and staff.

24 On August 5, 2021, the Centers for Disease Control (hereinafter “CDC”) published their
25 most recent Guidance for COVID-19 Prevention in K-12 Schools. See Exhibit 5. The CDC also
26 recommends that schools encourage children and staff who have been exposed to COVID-19 to
27 stay home and test, encourage good hand hygiene, promote vaccination to eligible students and
28 staff, maintain a policy of physical distancing between students and staff, limit non-essential

1 visitation to the schools, establish contact tracing programs, improve ventilation where possible
2 and disinfect surfaces within the school on a daily basis. The CDC also recommends that schools
3 implement universal masking policies.

4 During the Spring of 2020, The School District of Waukesha held classes remotely, this
5 policy continued to varying degrees into the 2020-2021 School year, but on October 14, 2020, the
6 BOARD voted to begin to return children to full time in person schooling. See Exhibit 6 (October
7 14 School Board minutes). In order to keep their students safe from Covid-19, the Waukesha
8 School district had a robust Covid-19 mitigation strategy that included mandatory masking.
9 During the 2020-2021 School year BR and his two siblings attended Rose Glen Elementary
10 School which had several different Covid-19 infection mitigation strategies in place. These
11 strategies included universal masking, regular body temperature checks, and plexiglass dividers.
12 See Exhibit 7, (Declaration of Shannon Jensen).

13 On May 12, 2021, The Board of Education for the School District of Waukesha voted to
14 end many of their Covid-19 mitigation policies, including their universal masking requirement.
15 See Exhibit 8, (May 12, 2021, School board minutes). When the 2021-2022 School year began,
16 BR returned to school and wore a mask daily. Many of BR's classmates chose not to wear masks
17 to school, however. Then, on September 16, 2021, one of BR's classmates came to school with
18 Covid-19 symptoms. The following day, on September 17, 2021, that same student visited the
19 school nurse twice and was eventually sent home due his Covid-19 symptoms. BR was seated
20 next to his sick classmate on both days. BR's sick classmate did not wear a mask to school. On
21 September 19, 2021, BR became symptomatic and tested positive for Covid-19. Unfortunately, on
22 September 18 and 19, 2021, BR attended multiple community events likely spreading Covid-19 to
23 members of the community.

24 **III. MEMORANDUM OF POINTS AND AUTHORITIES**

25 **Temporary Restraining Order Standard**

26 "The court may issue a temporary restraining order without written or oral notice to the
27 adverse party or its attorney only if: specific facts in an affidavit or a verified complaint clearly
28 show that immediate and irreparable injury, loss, or damage will result to the movant before the

1 adverse party can be heard in opposition; and the movant's attorney certifies in writing any efforts
2 made to give notice and the reasons why it should not be required” Fed. R. Civ. P. 65.

3 “Fed. R. Civ. P. 65 “A plaintiff seeking a preliminary injunction must establish that he is
4 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
5 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
6 public interest. See *Munaf v. Geren*, 553 U.S. 674, 689-690, 128 S.Ct. 2207, 2218–2219, 171
7 L.Ed.2d 1 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94
8 L.Ed.2d 542 (1987) ; *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–312, 102 S.Ct. 1798, 72
9 L.Ed.2d 91 (1982)”. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “In *Winter*
10 *v. Nat. Res. Def. Council, Inc.* , 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), the Court
11 stated that “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed
12 on the merits.” *Id.* at 20, 129 S.Ct. 365 (emphasis added). Similarly, when discussing the requisite
13 showing to establish irreparable injury, the Court explained that its standard “requires plaintiffs
14 seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an
15 injunction.” *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020). “If a plaintiff makes such a
16 showing, the court proceeds to a balancing analysis, where the court must weigh the harm the
17 denial of the preliminary injunction would cause the plaintiff against the harm to the defendant if
18 the court were to grant it. *Courthouse News Serv.* , 908 F.3d at 1068. This balancing process
19 involves a “sliding scale” approach: the more likely the plaintiff is to win on the merits, the less
20 the balance of harms needs to weigh in his favor, and vice versa. *Ty, Inc. v. Jones Grp., Inc.* , 237
21 F.3d 891, 895 (7th Cir. 2001). Mandatory preliminary injunctions—those “requiring an affirmative
22 act by the defendant”—are “ordinarily cautiously viewed and sparingly issued.” *Graham v.*
23 *Medical Mut. of Ohio* , 130 F.3d 293, 295 (7th Cir. 1997) ; see also *Pashby v. Delia* , 709 F.3d
24 307, 319 (4th Cir. 2013) (review of a preliminary injunction is “even more searching” when the
25 injunction is “mandatory rather than prohibitory in nature.”) *Mays v. Dart*, 974 F.3d 810, 818 (7th
26 Cir. 2020). “In balancing the harms , the court also considers the public interest” *Life Spine Inc. v.*
27 *Aegis Spine, Inc.*, 21-1649, at *1 (7th Cir. Aug. 9, 2021).

1 **Legal Argument**

2 a. **Plaintiff is Likely to Succeed on the Merits**

3 Plaintiff's Complaint for Injunctive and Declaratory relief brings three claims before this
4 court. First, the Defendants and all school boards and school districts throughout the state of
5 Wisconsin have a duty to protect BR and all similarly situated students from Covid-19 under the
6 Fourteenth Amendment as school districts created a risk of infection by bringing students back to
7 school from virtual learning. Second, the Defendants and all school boards and school districts
8 throughout the state of Wisconsin have a duty to BR and all similarly situated students under the
9 Fourteenth Amendment due to the special relationship between students and school districts
10 created by the circumstances surrounding the Covid-19 pandemic. Finally, the Defendants and all
11 school boards and school districts throughout the state of Wisconsin have a duty to BR, all
12 similarly situated students, and the community as a whole to limit the rates of infection within
13 their schools under the public nuisance doctrine.

14 **i. Plaintiff's First Claim for Relief.**

15 Defendants and all similarly situated school districts and school boards owe BR and all
16 similarly situated students a duty to protect them from Covid-19 under the Fourteenth Amendment
17 to the Constitution of the United States. "To state a claim for relief under 42 U.S.C. § 1983, a
18 plaintiff must allege that he or she was deprived of a right secured by the Constitution or the laws
19 of the United States, and that this deprivation occurred at the hands of a person or persons acting
20 under the color of state law. *Buchanan–Moore v. Cty. of Milwaukee*, 570 F.3d 824, 827 (7th
21 Cir.2009). Although the Due Process Clause of the Fourteenth Amendment prevents the state from
22 infringing on an individual's right to life, liberty, or property, it does not "impose an affirmative
23 obligation on the [s]tate to ensure that those interests do not come to harm through other means."
24 *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195, 109 S.Ct. 998, 103 L.Ed.2d
25 249 (1989). The Due Process Clause limits the state's power to act, but does not act "as a
26 guarantee of certain minimal levels of safety and security." *Id.* at 195, 109 S.Ct. 998. Accordingly,
27 the Clause generally does not impose upon the state a duty to protect individuals from harm by
28 private actors. *Id.* at 197, 109 S.Ct. 998. However, two exceptions have grown out of this general
principle. The first obligates the state to protect individuals with whom it has a "special
relationship," such as a custodial relationship that cuts off alternative avenues of aid. *Monfils v.*
Taylor, 165 F.3d 511, 516 (7th Cir.1998). The other is the "state-created danger exception," which

1 applies when a state actor's conduct “creates, or substantially contributes to the creation of, a
2 danger or renders citizens more vulnerable to a danger that they otherwise would have been.” *Reed*
3 *v. Gardner*, 986 F.2d 1122, 1126 (7th Cir.1993 *D.S. v. E. Porter Cnty. Sch. Corp.*, 799 F.3d 793,
4 798 (7th Cir. 2015). To prevail under a state-created danger theory a Plaintiff “must show three
5 things: (1) that the state—here, East Porter—by its affirmative acts, created or increased a danger
6 that D.S. faced; (2) that East Porter's failure to protect D.S. from danger was the proximate cause
7 of her injury; and (3) that East Porter's failure to protect D.S. shocks the conscience.” See *King ex*
8 *rel. King v. East St. Louis Sch. Dist.* 189,496 F.3d 812, 818 (7th Cir.2007). *Id* at 798. Ultimately,
9 “If the state puts a man in a position of danger from private persons and then fails to protect him, it
10 will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it
11 had thrown him into a snake pit.” *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)

12 Defendants clearly increased the danger of infection to BR when they ended their virtual
13 learning program and brought him back into Rose Glen Elementary. During parts of the 2019-
14 2020 and 2020-2021 school years schools within the School District of Waukesha and throughout
15 Wisconsin were closed and BR and similarly situated students attended school virtually. When
16 BR and similarly situated students were attending classes virtually from home their risk of
17 exposure to Covid-19 was limited to exposure from their immediately family, but when the
18 school districts took the affirmative action of bringing students back to class and by allowing
19 visitors to enter their schools unmasked and untested they threw BR and other similarly situated
20 students into a “Covid-19 snake pit” and are now obligated under the Fourteenth Amendment to
21 protect them from a Covid-19 infection.

22 Similarly, BR’s infection was clearly caused by the Defendants’ failure to protect him from
23 Covid-19. BR was sitting in a classroom with unmasked infected students and then became
24 infected with Covid-19 himself. This situation was not unique to Defendant and has occurred
25 thousands of times around the state of Wisconsin and could have likely been avoided through
26 following the advice of public health officials. See Exhibit 1. The behavior of the Defendants
27 and many school boards around the state also shocks the conscious. They have each made the
28 decision during a global pandemic to ignore the guidance of the experts at the Centers for Disease
Control and the Wisconsin Department of Public Instruction and instead unnecessarily expose
children to a deadly infection.

1 As Defendants and similarly situated school boards and school districts have taken actions to
2 affirmatively increase the danger of Covid-19 infection to Students, are the proximate cause of
3 Covid-19 infections and are acting in a way that shocks the conscious, Plaintiff will prevail on her
4 first claim for relief.

5 **ii. Plaintiff's Second Claim for Relief.**

6 Defendants and all similarly situated school districts and school boards owe BR and all
7 similarly situated students a duty to protect them from Covid-19 under the Fourteenth Amendment
8 to the Constitution of the United States because of the special relationship that Covid-19 has
9 created between School Districts and Students. While the courts have been unwilling to find a
10 special relationship between schools and school children in the past, the Covid-19 pandemic
11 changes that analysis. "Our court, in dealing with the "special relationship " exception to the
12 *DeShaney* doctrine, has remained faithful to the Supreme's Court's rationale that this exception
13 must be grounded in a prior restriction of the individual's liberty that places that person in a danger
14 that would not have been encountered, at least to the same order of magnitude, in the absence of
15 the state's action. For instance, in *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), the City of
16 Waukegan was determined to be not liable for failing to save the drowning plaintiff because the
17 city had no duty to provide rescue services. *Id.* at 1428. By contrast, the claim against Lake
18 County was reinstated because the plaintiff had alleged that the county had a custom of requiring
19 officers to prevent unauthorized persons from trying to rescue the drowning. The court
20 distinguished *DeShaney*, holding that the alleged policy would constitute an active imposition that
21 put people at harm, not a refusal to provide services." *Kitzman-Kelley ex rel. Kitman-Kelley v.*
22 *Warner*, 203 F.3d 454, 458 (7th Cir. 2000). "[w]hen a state actor . . . deprives a person of his
23 ability to care for himself by incarcerating him, detaining him, or involuntarily committing him, it
24 assumes an obligation to provide some minimum level of well-being and safety"). The state's
25 failure to meet this duty of care constitutes a violation of the Due Process Clause of the Fourteenth
26 Amendment." *Estate of Allen v. City of Rockford*, 349 F.3d 1015, 1019 (7th Cir. 2003). Similarly,
27 "when "the state has a 'special relationship ' with a person, that is, if the state has custody of a
28 person, thus cutting off alternative avenues of aid." *Id.*" *Estate of Her v. Hoeppner*, 939 F.3d 872,
876 (7th Cir. 2019)

In the instant case, the Covid-19 pandemic has created a special relationship between the
students and schools, because while the students are only in the custody of the school during the

1 school day, the only individuals capable of protecting them from the Covid-19 infection are the
2 school district employees. Similarly, during the school day, students do not have the ability to
3 protect themselves from Covid-19 infection. They can only be protected by an entire collection of
4 Covid-19 mitigation strategies. See Exhibits 1, 4, and 5. By bringing students into the classroom,
5 the school districts have effectively cut off all avenues of aid to the students, creating a duty by
6 which their school districts must protect them from Covid-19 infections.

7 The Defendants and similarly situated school districts recklessly breached their duty to protect
8 their students from Covid-19 by refusing to implement the CDC and DPI guidelines and their
9 breach of this duty has resulted in thousands of infections throughout the state of Wisconsin. See
10 Exhibit 1. As such, Plaintiff will prevail on her second claim for relief.

11 **iii. Plaintiff's Third Claim for Relief.**

12 Defendants and all similarly situated school districts and school boards are maintaining a
13 public nuisance by bringing students to school without effective Covid-19 mitigation strategies in
14 place. "A nuisance is an unreasonable activity or use of property that interferes substantially with
15 the comfortable enjoyment of life, health, safety of another or others. *State v. Quality Egg Farm,*
16 *Inc.*, 104 Wis. 2d 506, 517 (Wis. 1981) quoting *Hunter v. McDonald*, 78 Wis.2d 338, 344, 254
17 N.W.2d 282 (1977) "liability for maintaining a public nuisance can be based on either negligent or
18 intentional conduct that maintains a condition or activity which substantially or unduly interferes
19 with the use of a public place or with the activities of an entire community. Second, both notice
20 and causation, concepts oftentimes reserved for negligence cases, are required to establish liability
21 for maintaining a public nuisance. Third, for the purposes of comparing and apportioning
22 responsibility for the accident, and for determining contribution among culpable parties, we
23 conclude that when all of the elements to establish liability for maintaining a public nuisance are
24 affirmatively proven, a defendant's failure to abate a public nuisance is analogous to negligence
25 per se." *Physicians Plus v. Midwest Mut*, 254 Wis. 2d 77, 101-02 (Wis. 2002).

26 Covid-19 is spreading rampantly through the defendants' school district and similarly situated
27 school districts throughout the state. See Exhibit 1. The children who are infected at school then
28 leave the school grounds and head into the community spreading the disease to the general public
interfering with the health and safety of the entire state. The defendants and similarly situated
school boards and districts have been provided with notice in the form of guidance from both the

1 CDC and DPI on how to mitigate the spread of covid-19 throughout their schools. They are
2 ignoring this guidance and the infection is continuing to spread. See exhibit 1. Defendants and
3 similarly situated school boards are clearly maintaining a public nuisance and it needs to be
4 abated. As such, Plaintiff will prevail on her third claim for relief.

5
6 **b. Plaintiff is Likely to Suffer Irreparable Harm without the Preliminary Injunction.**

7 Defendants' and similarly situated school boards and school districts' failure to protect their
8 students through the implementation of adequate Covid-19 mitigation strategies, will result in
9 irreparable injury to the students and community. Covid-19 is a fatal disease and death cannot be
10 appropriately remedied. See Exhibit 1, 4 and 5.

11 Further, "for some kinds of constitutional violations, irreparable harm is presumed. See 11A
12 CHARLES ALAN WRIGHT ET ALAN FEDERAL PRACTICE PROCEDURE § 2948.1 (2d ed.
13 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no
14 further showing of irreparable injury is necessary.")" *Ezell v. City of Chicago*, 651 F.3d 684, 699
15 (7th Cir. 2011). And "Unlike monetary injuries, constitutional violations cannot be adequately
16 remedied through damages and therefore generally constitute irreparable harm. See *Monterey*
17 *Meek Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997)" *Nelson v. National Aeronautics*, 530 F.3d
18 865, 882 (9th Cir. 2008)(reversed on other grounds). Plaintiff has clearly demonstrated that
19 Defendants and similarly situated school boards and school districts have violated the rights of BR
20 and similarly situated students under the Fourteenth Amendment to the Constitution of the United
21 States of America. This showing alone is enough to demonstrate that irreparable harm is not only
22 likely, but it has already occurred and is ongoing.

23 **c. The Balance of Equities Tips Towards the Plaintiff**

24 The balance of equities greatly favors the Plaintiffs in this matter. "To obtain a preliminary
25 injunction , the moving party must show that its case has "some likelihood of success on the
26 merits" and that it has "no adequate remedy at law and will suffer irreparable harm if a
27 preliminary injunction is denied." *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). If the
28 moving party meets these threshold requirements, the district court "must consider the irreparable
harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm
against the irreparable harm the moving party will suffer if relief is denied." *Ty, Inc. v. Jones*

1 *Group, Inc.*, 237 F.3d 891, 895 (7th Cir.2001). The district court must also consider the public
2 interest in granting or denying an injunction .Id. In this balancing of harms conducted by the
3 district court, the court weighs these factors against one another “in a sliding scale analysis.”
4 *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (7th Cir.2006). “The sliding scale approach is
5 not mathematical in nature, rather ‘it is more properly characterized as subjective and intuitive,
6 one which permits district courts to weigh the competing considerations and mold appropriate
7 relief.’ ” *Ty, Inc.*, 237 F.3d at 895–96 (quoting *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12
8 (7th Cir.1992)). Stated another way, the district court “sit[s] as would a chancellor in equity” and
9 weighs all the factors, “seeking at all times to ‘minimize the costs of being mistaken.’ ” *Abbott*
10 *Labs.*, 971 F.2d at 12 (quoting *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593 (7th
11 Cir.1986)). *Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 678 (7th Cir. 2012).

11 When the court considers the balance of equities in the matter, the first thing they should
12 consider is the efficacy of mandatory masking policies and the DPI and CDC guidelines. See
13 Exhibit 1. Should the Defendants and similarly situated school districts implement these
14 guidelines its clear that the rates of infection within their schools should decrease.

15 Under a sliding scale analysis, the balance of equities tips towards the Plaintiff. The Plaintiff
16 has a made a showing that they are likely to succeed on the merits and that without the TRO there
17 will be irreparable harm in the form of death and the violation of constitutional rights. Whereas
18 there is no risk of injury to the defendants or similarly situated school boards should the TRO be
19 put into place, they would merely be following the guidance of the CDC and DPI.

20 **d. It is in the Public Interest that the Court Grant the Preliminary Injunction**

21 Covid-19 is a deadly and infectious disease. See exhibit1. The public has a clear interest in
22 reducing the spread of Covid-19 within the schools and the community and as such granting this
23 TRO is within the interest of the public.

24 **e. Bond Should Not Be Required.**

25 FRCP 65(c) requires that “The court may issue a preliminary injunction or a temporary
26 restraining order only if the movant gives security in an amount that the court considers proper to
27 pay the costs and damages sustained by any party found to have been wrongfully enjoined or
28 restrained.” This TRO is exclusively asking for an order mandating students wear masks to class

1 the cost to Defendants should be negligible as most masks would be provided by the students. As
2 such a bond is unnecessary in this matter.

3 **f. Provisional Class Certification.**

4 Plaintiff is requesting that this court provisionally certify 2 classes for the purposes of this
5 TRO under Federal Rule of Civil Procedure 23(b)2. Provisional class certification is
6 appropriate for both a Plaintiff class and Defendant Class because final class certification will
7 be appropriate in this matter. Class certification is governed by Federal Rule of Civil
8 Procedure 23. Under Rule 23(a), the party seeking certification must demonstrate, first, that:

9 "(1) the class is so numerous that joinder of all members is impracticable,

10 "(2) there are questions of law or fact common to the class ,

11 "(3) the claims or defenses of the representative parties are typical of the claims or defenses of
12 the class , and

13 "(4) the representative parties will fairly and adequately protect the interests of the class "
14 (paragraph breaks added).

15 Second, the proposed class must satisfy at least one of the three requirements listed in Rule
16 23(b). Respondents rely on Rule 23(b)(2), which applies when "the party opposing the class
17 has acted or refused to act on grounds that apply generally to the class , so that final injunctive
18 relief or corresponding declaratory relief is appropriate respecting the class as a whole.

19 Provisional class certification is appropriate in this matter Plaintiff and Defendant classes
20 satisfy the numerosity, commonality, typicality and adequacy requirements of Rule 23(a). The
21 Plaintiff Class consists of all public-school K-12 students who have been infected with Covid-19
22 while at school, this number is believed to be greater than 1000, satisfying the numerosity
23 requirement. See exhibit 1. The Defendant class consists of school boards, school board members,
24 superintendents and school districts refusing to implement the face mask requirement
25 recommended for K-12 Schools by the DPI and CDC satisfying the numerosity requirement.
26 While Plaintiff has not yet determined this number it is believed to be so great that joinder would
27 be impractical if not impossible.
28

1 Similarly, the claims of Shannon Jensen individually, and as next friend of BR share common
2 questions of law and fact with the claims of the absent members of the Plaintiff class satisfying the
3 commonality requirement. As the Plaintiff claims are share common questions of law and fact so
4 do the defenses of the named and absent Defendant class also satisfying the commonality
5 requirement.

6 The typicality requirement is also satisfied by both the Plaintiff and Defendant classes. the
7 claims Shannon Jensen individually, and as next friend of BR brings, have a common origin and
8 share a common basis with the absent class members. Their claims originate from reckless refusal
9 of both the named and absent school boards and school districts to implement reasonable Covid-
10 19 mitigation measures. As such, both the Plaintiff and Defendant Classes meets the typicality
11 requirement.

12 Plaintiff Shannon Jensen is willing and prepared to serve the Court and proposed class in a
13 representative capacity with all of the obligations and duties material hereto. She will fairly and
14 adequately protect the interest of the class and has no interests adverse to, or which directly and
15 irrevocably conflict with, the interests of other members of the class. She has also engaged the
16 services of counsel indicated below. Said counsel has experience in civil rights and class litigation,
17 will adequately prosecute this action, and will assert, protect and otherwise well represent the
18 named class representatives and absent class members.

19 The named Defendants are from a relatively large and wealthy school district and should have
20 the means to defend this action. Given that the action is exclusively for declaratory and injunctive
21 relief there should not be any conflict between the named and absent Defendant Class members.
22 Similarly, this action focuses almost exclusively on questions of law and is not particularly fact
23 specific, as such if the named Defendants' counsel adequately represents the named Defendants,
24 they are also adequately representing the class.

25 Further, certification under the Federal Rule of Civil Procedure 23(b)(2) is appropriate in this
26 matter. Certification under Federal Rule of Civil Procedure 23(b)(2) is appropriate when "the
27 party opposing the class has acted or refused to act on grounds that apply generally to the class, so
28 that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as
a whole. In this matter all of the parties within the proposed Defendant class have undertaken the
same reckless conduct causing the same type of injury to every member of the proposed Plaintiff
class. Plaintiffs are also only requesting declaratory and injunctive relief which will apply

1 generally to both classes, so certification under Federal Rule of Civil Procedure 23(b)(2) is
2 appropriate.

3 **VI. Conclusion**

4 As the Plaintiff is likely to prevail on the merits of the case, there will be irreparable harm
5 without a temporary restraining order, the balance of the equities favors the Plaintiff and public
6 policy dictates that a temporary restraining order be put in place, Plaintiff requests a temporary
7 restraining order, ordering all school districts refusing to enact the Covid-19 mitigation
8 recommendations of the CDC and DPI to enact a universal mask mandate. While Plaintiff will
9 eventually be asking for broader injunctive relief, Plaintiff believes that a universal mask mandate
10 in Wisconsin schools will be a reasonable stop gap measure until this court has the opportunity to
11 hold a preliminary injunction hearing. See Exhibit 1. In the alternative, Plaintiff would ask for a
12 temporary restraining order ordering a mask mandate in the Waukesha School District schools.

13 DATED: October 15, 2021

14
15 By: /s/ Frederick Melms

16 Frederick Melms

17 Attorney for Plaintiff

18 Shannon Jensen
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Frederick Melms
2 6329 Spindrift Foam Ave,
3 Las Vegas NV, 89139
4 715-892-3023
fbmelmsesq@gmail.com

5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN**

8 BR b/n/f SHANNON JENSEN, on behalf of
9 themselves and those similarly situated,

10 Plaintiff,

11 vs.

12 SCHOOL DISTRICT OF WAUKESHA;
13 WAUKESHA BOARD OF EDUCATION;
14 JOSEPH COMO JUNIOR; JAMES SEBERT;
15 BILL BAUMGART; GREG DEETS;
16 PATRICK MCCAFFERY; COREY
17 MONTIHO; KELLY PIACSEK; KARIN
RAJNICEK; AMANDA RODDY; ANTHONY
ZENOBIA; AND DOES 1-10, on behalf of
themselves and those similarly situated,

18 Defendant

Case No.: 2:21-cv-01151-SCD

**DECLARATION OF FREDERICK
MELMS**

19
20 **Declaration of Frederick Melms Pursuant to 28 U.S. Code § 1746**

21 I, Frederick Melms, declare under penalty of perjury under the laws of the United
22 States of America that the foregoing is true and correct.

- 23
24 1. I am the attorney for the Plaintiff in the instant case.
25 2. Defendants have been provided notice of this action through personal service.
26 3. Defendants' attorneys electronically filed notices of appearance for this action on
27 10/14/2021

28 DECLARATION OF FREDERICK MELMS - 1

1 4. Defendants by and through their attorneys will receive notice of this TRO through the
2 electronic court filing system.

3 5. Upon filing, I will also provide a copy of the TRO via email to Defendants' attorneys.
4

5 6. This court should still consider this TRO ex parte due to the danger of inaction outlined
6 in the motion for the TRO and Exhibit 1 of the TRO.
7
8

9 Executed on October 15, 2021
10
11

12
13 Frederick Melms

14 Frederick Melms
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION OF FREDERICK MELMS - 2